LUMMI INDIAN BUSINESS COUNCIL
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DEPARTMENT_____DIRECT NO. _____

April 15, 2013

VIA EMAIL (tax.reform@mail.house.gov)

Hon. David Reichert, Chair
Hon. John Lewis, Vice Chair
U.S. House of RepresentativesWays & Means Committee
Working Group on Charitable/Exempt Organizations
Washington, D.C. 20515

Re: *Indian Country Tax Reform Proposals*

Dear Chairman Reichert and Vice Chairman Lewis:

As you and your colleagues consider the reform of the U.S. Tax Code, the Lummi Nation requests that the Congress take corrective action to (i) address the historic mistreatment of sovereign Indian nations and our tribal citizens by the Courts and Internal Revenue Service of the United States, and (ii) assist us in creating jobs and promoting economic development within our sovereign tribal territories.

In 1855, our people and other Puget Sound tribes agreed to relinquish interests to lands in what is now Washington State in exchange for the preservation of remaining inherent sovereign rights.[1]Nowhere in that treaty did we agree, nor did the United States assert, that U.S. federal and state taxes would apply in our territory and waters. Since that time, however, our people, our trading partners, and our remaining lands have come increasingly under the authority of federal and state taxing authorities in violation of our treaty rights. In doing so, the wealth of our Nation and our people has been sapped which has contributed to the economic and social detriment of our people. Moreover, we live with constant concern that the Internal Revenue Service – which has never been specifically authorized by the Congress to enforce U.S. tax laws in Indian Country – will conduct invasive and expensive audits of our people and our Nation that will interfere with our treaty-recognized and Congressionally-supportedright of self-government.

What follows are specific proposals to remedy this mistreatment and restore a foundation of respect for the Lummi Nation and all sovereign Indian nations in the United States that will recognize our treaty relationship and support our economic revitalization.

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[1] *See* Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927.

## I. THE BASIS FOR CONGRESSIONAL TRIBAL TAX REFORM: THE CONSTITUTION'S RECOGNITION OF "INDIANS NOT TAXED" AND EXISTING TRIBAL TAX IMMUNITIES

A. *"Indians Not Taxed."* Article I, Section 2 of the U.S. Constitution excludes "Indians not taxed" for purposes of apportionment in the House of Representatives and the levying of direct taxes.[2] At the time the Constitution was written, the meaning of this phrase was self-evident – that there existed Indians who lived outside of American political authority and who were not to be taxed or counted for apportionment purposes. While the history reflects that there were a few Indians that had assimilated into American society at the time of the founding, and thus were "Indians taxed," the vast population of Indians at the time lived under the political authority of their own sovereign nations and not the United States.[3]

This understanding – that Indians lived under the laws of their own sovereign nations and should not be subject to U.S. tax laws – was sustained for 155 years. In 1931, however, the U.S. Supreme Court concluded that the federal Income tax applied to Indians as it did to other persons within the United States.[4] The Court gave little explanation for this conclusion. The closest thing to an explanation came in 1940, when the Solicitor of the Department of the Interior issued a formal opinion on the meaning of the "Indians not taxed" provision in the Constitution.[5]

The 1940 Solicitor's Opinion concluded that the "Indians not taxed" provision of the Constitution referred to Indians that existed at the time the Constitution was adopted, but who no longer existed following the enactment of the Indian Citizenship Act of 1924[6] and the Supreme Court's *Superintendent v. Commissioner*decision in 1835.[7] The Indian Citizenship Act was a statute of collective naturalization of Indian people, unprecedented in the history of the United States in that Indians were not given any choice over whether to become American citizens. Nowhere in the Citizenship Act did the Congress expressly authorize the taxation of Indian people. Indeed, it expressly preserved certain tribal treaty property rights.[8]Given that the federal Income tax was Constitutionally authorized in 1913, the fact that Congress did not expressly address the Constitutional reference to "Indians not taxed" should have preserved that categorization of tribal Indians despite thepassage of the Indian Citizenship Act.

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2 Similar language is also found in the Fourteenth Amendment.

3 For example, the Congressional instructions to the enumerators of the 1860 Census provided: "Indians *not taxed* are not to be enumerated. The families of Indians who have renounced tribal rule, and who under state or territory laws exercise the rights of citizens, are to be enumerated." *See* Instructions to Marshals, Eighth Census, United States (1860), at 14.

4 *See Choteau v. Burnet*, 283 U.S. 691 (1931); *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935), *reversingBlackbird v. Commissioner of Internal Revenue*, 38 F.2d 976 (1930).

5 Op. Sol. Interior, 57 Interior Dec. 195 (1945).

6 Act of June 2, 1924, 43 Stat. 253.

7 *See* 57 Interior Dec. at 207 ("Since all Indians are today [in 1940] subject to taxation by the Federal Government, there are no longer Indians not subject to taxation.") (citation omitted).

8 See Act of June 2, 1924 ("[T]he granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.").

But the Supreme Court's summary conclusion that Indians are subject to federal income tax, combined with the shocking and erroneous Solicitor's Opinion that treaty-based "Indians not taxed" no longer exist,serves as the foundation for the continuing violation of treaty-protected tribal tax immunities. Armed with these legal tools, the Internal Revenue Service has systematically sought to drain wealth from Indian people over the past several decades. On the basis of revenue rulings and court decisions, the IRS has consistently categorized Indians as "taxpayers" and ignored the Constitution's reference to "Indians not taxed" as having any legal meaning.

Because the United States entered into treaties with Indian nations that preserved tribal sovereignty and self-government, and because no treaty amendment or Act of Congress expressly authorizes the taxation of Indian income on tribal lands, there does in fact remain a category of "Indians not taxed" within the United States. It is requested that Congress enact appropriate corrective measures, as follows, to ensure that this Constitutional categorizationand treaty status is restored.

B. *Recognized Tribal Tax Immunities.*Despite this legal history, the U.S. courts and Internal Revenue Service have recognized certain tax immunities for Indians and Indian tribes. For example, two important immunities from taxation are that:

- *Income earned by Indian tribes is not subject to income taxation*,[9]and
- *Income earned by individual Indians that is "derived" from trust lands is not subject to income taxation*.[10]

The rationale for these tax immunities is clear. Because Indian treaties establish a relationship between two sovereign governments, the United States government should not tax the income earned by a tribal sovereign government. And because treaties, and some specific acts of Congress, expressly recognize the immunity of Indian lands from taxation, income earned by individual Indians from those lands should not be taxed.

Based on this recognition of treaty-based taxed immunities, the Lummi Nation and other Pacific Northwest tribes worked with Congress in 1988to secure an additional recognized treaty-based exemption:

- *Income earned from exercise of treaty-protected fishing rights is not subject to taxation*.[11]

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9 Rev. Rul. 67-284, 1967-2 C.B. 55; *see generally*COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 678-680 (2012 ed.) ("COHEN'S HANDBOOK").

10 *Squire v. Capoeman*, 351 U.S. 1, 9 (1956); *see generally*COHEN'S HANDBOOK 680-688.

11 Pub. L. 100-647, title III, § 3041(a) (Nov. 10, 1988) codified at 26 U.S.C § 7873; *see generally*COHEN'S HANDBOOK 687-688.

The fact that we had to ask Congress to recognize the tax immunity of our fishing income is further testament to the problem that the IRS presents to Indian Country. With no express authorization by Congress, the IRS time and time again has ignored the Constitution and tribal treaty rights and simply presumes that all income earned by Indians on tribal lands and waters is subject to taxation unless the Tax Code expressly exempts it. Whereas American law requires that all ambiguities in treaties and statutes shall be interpreted in favor of the Indians,[12] the IRS always presumes the opposite – that Indians are subject to tax until the Congress or the courts indicate otherwise.

This recent history of Indian taxation has consequences and serves as the foundation for the Lummi Nation's request for relief from Congress. Indian treaty rights should be respected because we have already negotiated our immunity from federal government taxation of income earned on our lands and waters. Failing to do so has continuing economic consequences: federal taxation drains precious wealth away from Indian tribal societies that could better be used to support tribal economic self-sufficiency. We understand that taxation in the United States represents the obligation of the citizen to support civil society. But Indian people have already paid the price for the cost of American civil society through the relinquishment of nearly all of our lands in exchange for what little land and freedom we retain. Congress should take corrective action to remedy the consequences of this unauthorized legal devolution.

## II. PROPOSALS TO RESPECT TREATY-BASED TAX IMMUNITIES, PROMOTE JOB CREATION AND STRENGTHEN TRIBAL ECONOMIES

Congress should reform the U.S. tax laws dealing with Indian tribes not just to conform tax policy with Indian treaties, but because tribal tax reform is necessary to promote job creation and strengthen tribal economies. Despite the success of some Indian nations and tribes through gaming and other business ventures, Indians remain some of the poorest people in the United States. Congress has recognized the chronic economic deprivation of Indian Country, where employment rates in some locations reach 75 percent:

> The United States is suffering one of the worst economic declines and stagnant job markets in generations. The effects of this disaster hit especially hard in rural communities, where many reservations are located. Many reservations are located in remote, rural areas that lack adequate facilities, infrastructure, and housing. The rural locations of many reservations mean that jobs are scarce and many Indians living on reservations suffer from great poverty. Because of these limitations, existing reservation lands do not readily support tribal economic development.[13]

The following proposals would take meaningful steps to end this economic deprivation, give proper respect the Constitution's recognition of "Indians not taxed," and encourage job growth and economic development in Indian Country.

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[12] *See Squire v. Capoeman*, 351 U.S. at 6-7; *see generally* COHEN'S HANDBOOK § 2.02.

[13] S. Rep. No. 112-166, *Amending the Act of June 18, 1934 To Reaffirm the Authority of the Secretary of the Interior to Take Land Into Trust for Indian Tribes* 30, May 17, 2012.

PROPOSAL #1. IMMUNIZE FROM TAXATION INCOME EARNED ON TRIBAL TRUST OR RESTRICTED FEE LANDS.

Current federal law developed by the Supreme Court and the IRS have evolved a distinction in the law between income earned by Indians "derived from" trust or restricted fee lands as opposed to income earned by Indians "on" trust or restricted fee land.[14] Income "derived from" the land is immune from tax; income earned "on" the land is taxable. There is no principled basis for this distinction and Congress should recognize tax immunity for all income earned by Indians "on" trust or restricted fee lands.

Why? Because taxing income earned by Indians on sovereign tribal territory unjustly deprives wealth from individual Indians and Indian nations that could better serve to improve the economic condition of Indian families and tribal economies. Congress has never expressly authorized this taxing of tribal wealth and doing so subverts the very economic policies embraced by the U.S. government in support of Indian nations. There are many deep-rooted problems with economic development in Indian Country, including insufficient incentives for entrepreneurship and job creation.Congress should establish tribal tax policy that respects treaties and the Constitution, preserves tribal wealth and promotes incentives for work and income generation.

Such a change is necessary for the U.S. government to continue to honor its commitment to the Lummi people. The Lummi Nation has the largest tribal commercial fishing fleet in Indian Country and fishing has served to sustain our people for generations. Unfortunately, fishing harvests are depleting and certain of our fisheries have been subject to disaster declarations by the U.S. Department of Commerce.[15] As our people must turn to the land rather than the water to support their families, they should not automatically become taxpayers simply because they must earn their income on the Nation's trust lands rather than our "usual and accustomed waters."

- Two Options:
  - Option A:100% Income Tax Credit for Income Earned on Trust or Restricted Fee Lands
  - Option B: 100% Income Tax Credit for Self-Employment Income

- Source of income:
  - Treaty-recognized and protected lands and waters, or
  - Other trust or restricted fee Indian Country lands
- Justification:
  - To respect treaty-based tax immunity
  - To create replace tax-immune income lost from farming, fishing, and other income "derived from" tribal lands

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14 *See Squire v. Capoeman*, 351 U.S. at 9; *see generally*COHEN'S HANDBOOK at 682.

15 *See* Treaty Indian Tribes in Western Washington, *Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource, and Recommendations for Change* (2011).

  - To create incentives for entrepreneurship, small business growth, and job creation
  - To preserve tribal wealth and strengthen and diversify tribal economies

- Budget Scoring Consideration:
  - Negligible. Given the poverty on tribal lands, most Indians earning income on tribal lands pay little or no federal income tax
  - Per capital distributions of net gaming revenue would remain unaffected as existing law already expressly provides for federal income taxation. [16]

PROPOSAL #2. ESTABLISH TRIBAL EMPOWERMENT ZONE DEMONSTRATION PROJECT.

Most of Indian Country remains chronically underdeveloped with some of the poorest areas located within the United States. Historic policies to promote development have largely failed. Indian gaming, which derives from the sovereign immunity of Indian nations from state laws and regulations (and now regulated by federal law), is a rare exception.[17] But the $28 billion Indian gaming industry proves an important point – when the right regulatory and tax conditions exist, tribal economies can flourish for the benefit of both Indians and non-Indians.

A similar magnet for economic investment can be created if tribal lands are restored to their original treaty-established legal condition – devoid of any taxation by the federal and state governments. To implement this initiative, it is proposed that Congress establish Tribal Empowerment Zones as a demonstration project to assess the long-term viability of this approach to promote investment and job creation in Indian Country.

- 50 Acre Zone located on Trust or Restricted Fee Indian Country lands
  - 100% Income Tax Credit for income earned from Jobs Created in Zone
  - 100% Exemption from Import Duties into Foreign Trade Zone located in Indian Country
  - At least 50% of the jobs created in the Zone must be for Indians

- Eligibility:
  - Demonstration Project for 50 tribes for 10-year project term
  - Reservation unemployment rate greater than 1% of State-wide average
  - Fisheries subject to a U.S. Commerce Department Fisheries Economic Disaster Declaration
  - Demonstrated likelihood of success

- Justification:
  - To respect treaty-based tax immunity
  - To create replace tax-immune income lost from farming, fishing, and other income "derived from" tribal lands

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16 *See* 25 U.S.C § 2710(b)(3)(D).

17 *See* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*

  - To create incentives for entrepreneurship, small business, and job creation
  - To preserve tribal wealth and strengthen and diversify tribal economies

- Budget Scoring Consideration:
  - Must be scored, however, given the poverty on tribal lands, most Indians earning income on tribal lands currently pay little or no federal income tax.

## PROPOSAL #3. IMMUNIZE FROM TAXATIONTRIBE-TO-TRIBE TRADE AND INVESTMENT

Traditionally, Indian nations and tribes engaged in extensive inter-tribal trade relations. These transactions were not subject to tax and outside regulation. Upon the establishment of reservations, Indian territories became surrounded by state jurisdictions. In recent years, states have begun to assess taxes and regulations on commerce occurring between two places in Indian Country. This taxation is a fluke of history and is an unauthorized burden on inter-tribal trade relations. Congress should prohibit state inference with commerce occurring between two or places in Indian Country.

The opportunities for Indian people to work together to create jobs and opportunity are considerable, including working with Alaska Native Corporations. Some tribes have abundant lands and natural resources to develop, but do not have the capital or expertise to do so. Other tribes have capital and expertise, but limited lands and resources. Congress can facilitate job creation and development in Indian Country by prohibiting state taxation and regulation of these investment opportunities.

- Trade relations between two places in Indian Country should not be subject to state taxation and regulation

- Alaska Native Corporations should be allowed to do business in "lower 48" Indian Country with the same tax treatment afforded tribal governments

- Justification:
  - States seek to impose excise taxation on business activities taking place on tribal lands needs investment capital to create jobs and opportunity
  - Tax barriers to investment by tribal governments and other Native-businesses should be eliminated to promote Tribe-to-Tribe trade
  - As Native people in the United States, Alaska Natives should be able to invest in Indian Country to generate revenues, share expertise, and create jobs where they are needed

- Federal Budget Scoring Considerations:
  - None. Current investments, if any, already occur on tribal trust or restricted fee lands. ANCs are not currently investing in Indian Country and so new investments do not result in federal revenue loss.

PROPOSAL #4 ALLOW TRANSFER OF RENEWABLE ENERGY TAX CREDITS FOR INDIAN COUNTRY PROJECTS

Indian Country has abundant wind, solar, water, and other natural resources for development. However, existing tax credits for renewable power development are unusable because Indian tribes are immune from tax. Accordingly, there is no tax-favored treatment for renewable energy projects in Indian Country and little to no renewable energy project investment occurs.

- 100 % of Renewable Energy Tax credits should be transferable to a non-Native partner for renewable energy projects established on tribal trust or restricted fee land

- Justification:
  - Current tax credits are unusable because tribal governments do not pay taxes
  - Renewable energy projects can thus not occur on Indian lands

- Federal Budget Scoring Considerations:
  - Must be determined.

## III. PROPOSALS TO TREAT INDIAN NATIONS AND TRIBES AS SOVEREIGN GOVERNMENTS, NOT PRIVATE ENTITIES

Congress enacted the Indian Tribal Government Tax Status Act of 1982 to require that tribal governments would be treated more like states than private entities.[18] This change occurred because the IRS had previously determined that certain tax treatment afforded state governments – such as being exempt from paying certain excise taxes and issuing tax-exempt bonds – had been denied to Indian tribes. In response,

> Congress, recognizing that both state and tribal governments perform similar functions for their citizens, passed the [Tax Status] act as a means of facilitating tribal governments in the exercise of their governmental powers.[19]

Unfortunately, the changes contemplated in 1982 remain incomplete. Tribal governments have yet to receive the full and equal treatment afforded state governments. For example, tribal governments remain subject to an "essential government function" test regarding the issuance of tax-exempt bonds.[20] Tribal governments are not recognized as having exclusive authority to tax business activities within their territories. And tribal governments remain subject to invasive and expense audits of their finances as if they were private entities.

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18 Pub. L. 97-473, Title II, § 202(a), 96 Stat. 2608 (1983) (codified as amended at 26 U.S.C. §§ 7701(a)(4), 7871; *see generally* Congressional Research Service, *The Indian Tribal Governmental Tax Status Act: An Overview*, Dec. 20, 2007 ("CRS Report").

19 *See* CRS Report at 1.

20 *See id.* at 3.

Congress should take additional steps to respect tribal sovereign governments like state sovereign governments. Rather than view tribes as objects of taxation and regulation, tribes should be viewed as government partners engaged in mutually-beneficialservice delivery for their citizens and neighbors. The following specific proposals seek to achieve this goal.

## PROPOSAL #4. 100% CREDIT FOR INCOME TAXES PAID OR MONIES DONATED TO TRIBAL GOVERNMENT

For most of U.S. history, Indian tribes have been so poor that almost no income tax revenue has been generated from income earned on tribal lands. Over the last few decades, however, that has begun to change primarily as the result of gaming. Economic activity has increased on tribal lands and so, too, has income tax generated from that activity.

At the same time, Indian tribes have continued to rely heavily on federal grants and the direct delivery of federal services as economic support for tribal economies. This economic support is a consequence of the Indian Self-Determination Policy implemented in the early 1970s.[21] Given the economic devastation inflicted on Indian Country prior to that period through the Termination Policy,[22] the last 40 years have been a veritable renaissance for some tribal nations.

But there exists a significant structural problem with the economic foundation of many tribal governments. Federal funding for many tribes is the primary, if not only, source of significant revenue to fund tribal government operations and delivery needed services. And as is well known, the federal budget is out of balance and tribes risk cutbacks of federal funds now and in the future. For Indian nations heavily dependent upon those funds, the future is bleak.

Even for those Indian tribes with a stronger economic position, U.S. government policies do not respect that tribal governments are service providers that depend upon revenue to sustain government operations. Tribes provide health care, law enforcement, infrastructure improvement, and other traditional government services. Unlike other governments, however, tribes have no tax base to generate revenue. This situation must change if economic progress in Indian Country is to continue.

To that end, one important first step is that Indian tribal governments should be allowed to retain all of the federal income tax that is generated from their citizens within tribal territories. Doing so would provide an important revenue stream for tribal governments and would

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21 *See e.g.* Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-458e).

22 *See* S. Rep. 112-166 at 8, n. 47.

strengthen self-governance. And doing so would afford Indian tribal governments the same tax status as Puerto Rico and the insular territories which have their own revenue systems.[23]

- Transfer all income taxes generated from tribal citizens back to their tribal government
  - 100% credit for taxes paid to a tribal government, or
  - 100% deduction for donations made to a tribal government

- Justification:
  - Preserve tribal wealth on tribal lands to support tribal government and services
  - Allow Indian tribes the same income tax treatment as U.S. territories and possessions like Puerto Rico or Guam

- Federal Budget Scoring Considerations:
  - Must be determined.

PROPOSAL #5. GENERAL WELFARE EXCLUSION FROM INCOME TAXATION

Until recently, the IRS systematically assumed that certain services provided by tribal governments to their citizens at certain levels could generate taxable income to the recipient. On December 5, 2012, the IRS announced a draft revenue procedure that it would adopt the "general welfare exclusion" to preclude taxation of most benefits received by tribal citizens from their own governments. The proposed draft revenue procedure is a step in the right direction as it treats tribal government services like services delivered by state and local governments. But the procedure is not complete and it remains subject to comment and improvement.

Most importantly, Indian Country needs an assurance that the General Welfare Exclusion will remain a permanent policy and not just an IRS revenue procedure that could be changed in the future. To ensure the long-term protection that tribal government services received by tribal citizens will not be subject to taxation, the Congress should mandate its application by law.

- Benefits provided by tribal governments to their citizens should not be subject to income taxation

- Justification:
  - Tribal government services should receive the same tax treatment as services provided by States
  - Legislative action will make the GWE permanent and not subject to IRS modification or termination over time

- Federal Budget Scoring Considerations:
  - Minimal.

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[23] *See* 26 U.S.C. § 931 (Guam, American Samoa and Northern Marianas Islands), 26 U.S.C. § 932 (Virgin Islands), 26 U.S.C. § 933 (Puerto Rico).

PROPOSAL #6. RESTRICT AUDITING OF TRIBAL GOVERNMENTS

Despite no authorization from Congress, the IRS in recent years has begun to randomly audit Indian tribal governments. To facilitate its tax collection efforts in Indian Country, the IRS established the Indian Tribal Governments Office ("ITG").[24] Information about ITG activities are shrouded in secrecy, but recently the Treasury Department Inspector General for Tax Administration ("TIGTA") released a report critical of the ITG's activities.[25]

The TIGTA reported that ITG had established a new program in 2004 called ADAPT[26]to investigate tribal governments and tribal citizens for tax noncompliance. While the ITG relies on "referrals from individuals" and "law enforcement officers," it also relies on "news articles" as indications of fraud and abuse. By far the most potent tool relied upon by ITG are "examinations of the books and records of Indian tribal entities," e.g. audits.

The TIGTA reported that between FY 2008 through FY 2010, it conducted audits of 95 tribal governments and 203 tribal citizens.[27] In FY 2011, the ITG expanded the ADAPT program and increased its enforcement efforts by conducting 416 audits. Surprisingly, the TIGTA reported that the actual number of audits conducted is unknown as "[t]he ITG office does not track the results of cases because it does not have a computer system to track enforcement actions the ITG office takes or subsequent enforcement actions taken by other functions of the IRS."[28] The Treasury summarized his assessment of ITG's actions as follows:

> Although the ITG office established the ADAPT in Fiscal Year 2004 with the broad goal of stemming the growth of fraud and abuse in the Indian tribal sector, it has not developed specific performance objective and measures. As a result, TIGTA could not determine if the ADAPT is effectively combating fraud and abuse in the Indian tribal sector.[29]

Not only is the Treasury Inspector General concerned about the actions of the IRS and ITG towards Indian tribes, so too,are your colleagues in the House of Representatives. Last fall, Chairman Don Young of the Subcommittee on Indian and Alaska Native Affairs examined the

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24 See IRS Indian Tribal Governments website, http://www.irs.gov/Government-Entities/Indian-Tribal-Governments/About-ITG("The overall goal of this office is to use partnership opportunities with Indian tribal governments, tribal associations, and other federal agencies to respectfully and cooperatively meet the needs of both the Indian tribal governments and the federal government and to simplify the tax administration process.")

25 Treasury Inspector General for Tax Administration, *"Fraud and Abuse are Addressed in the Indian Tribal Sector, but Performance Objectives and Measures are Needed to Assess Program Effectiveness,"* Ref. No. 2013-10-018, Jan. 28, 2013.

26 ADAPT refers to "Abuse Detection and Prevention Team".

27 *Id.* at 6.

28 *Id.*

29 *Id.* at Overview.

IRS handling of per capita payments from trust resources,[30] raising concerns that the IRS was taxing tribal payments of trust resources in violation of federal law.

Under current U.S. tax law, individuals and corporations are subject to income taxation. State and local governments, however, are not subject to taxation and are not thereby subject to investigations by the IRS. While no one disputes that individuals, whether they be Indians or non-Indians, who are engaged in criminal activities should be investigated and audited, the random "fishing expedition" type of audit that is occurring right now in Indian Country is disrespectful and subverts the government-to-government relationship established by treaty. Indian tribal governments can work in partnership with the IRS to address legitimate inquiries, no differently than the way in which tribal gaming operations work in a cooperative fashion with the National Indian Gaming Commission. The Congress should ensure that Indian tribal governments are treated like other governmentsand not "Indian tribal entities" subject to random auditing and investigation.

- Indian tribal governments should be treated like state governments for auditing purposes. No auditing or investigation of tribal governments or officials should occur without evidence of wrongdoing.

- Justification:
  - Tribal governments are sovereign and non-taxable governments
  - The IRS recognizes this status but should not use tribal governments to facilitate audits of individuals

- Federal Budget Scoring Considerations:
  - Minimal.

## PROPOSAL #7. RECOGNIZE THE TAX IMMUNITY OF TRIBAL CORPORATE ENTITIES

While the IRS recognizes that Indian tribes are not subject to taxation, it has not clearly established that tribally-owned corporate entities are also immune from taxation.[31]Tribally-owned corporations exist to carry out the revenue generating functions of tribal government. Occasionally, these entities may partner with non-Indians to facilitate transactions. The Congress should clarify that revenue generated by tribally-owned corporations, as extensions of tribal governments, should not be subject to taxation.

- Tribal corporate entities should have the tax immunity of the tribal owner if there is at least 51% ownership

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30 *See* U.S. House Subcommittee on Indian And Alaska Native Affairs, *Oversight Hearing on "Per Capita Act and Federal Treatment of Trust Per Capita Distributions,*" Sept. 14, 2012, http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=307521.

31 Rev. Rul. 94-16, 1994-1, C.B. 19; *see generally*COHEN'S HANDBOOK at 679-680.

- Justification:
    - Tribally-owned corporate development arms are engaged in the public purpose of generating revenue for tribal governmental purposes

- Federal Budget Scoring Considerations:
    - Minimal.

## IV. MOVING FORWARD ON A FOUNDATION OF RESPECT – TREASURY SELF-GOVERNANCE COMPACTING

One of the most significant evolutions in federal Indian policy during the last 25 years has been the establishment of the Self-Governance Programs in the Bureau of Indian Affairs and the Indian Health Service.[32] Rather than simply rely on bureaucracy-driven solutions to addressing needs in Indian Country, the Self-Governance Policy is about tribal governments and federal agencies working together to identify solutions to problems and allocating federal resources in an efficient manner to implement those solutions. The symbol of that cooperative approach is the Self-Governance Compact, a bilateral agreement whereby an Indian tribe and a federal agency can define the terms of their working relationship and use of federal funds.

Given the changes that have occurred in tribal economies, and the problems that currently exist in Indian Country relating to taxation, now is the time for Congress to consider establishing a Self-Governance program within the Treasury Department. While the details of such a program must be developed, many of the issues of concerned reflected above could be addressed in a Self-Governance Compact between an Indian nation and the Treasury Department.

Most importantly, Self-Governance Compacting would allow flexibility and choice in Indian Country for framing the desired relationship with the Treasury Department. Many tribes, for example, would not want to establish their own taxation system. Some would. Others may wish to have more protective oversight from the IRS of tribal government finances. Others would not. Establishing Self-Governance Compacting with the Treasury Department would allow the United States to achieve it policy goals relating to revenue and oversight while allowing Indian Country to retain tribal wealth and assume greater self-determination.

### PROPOSAL #8. ESTABLISH INDIAN COUNTRY TAXATION SELF-GOVERNANCE PROGRAM WITH TREASURY DEPARTMENT

- Authorize and direct the Treasury Department to enter into Self-Governance Compacts with interested Indian tribes
    - Recognize establishment of tribal revenue systems
    - Adopt and recognize IGRA-style system of self-regulation of tribal revenue management

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[32] Pub. L. 103-413 (1994) (codified at 25 U.S.C. §§ 450-450n and 458aa-458hh).

- Restrict audits of tribal government unless actual evidence exists of wrongdoing by tribal officials
- Recognize tax immunity of Tribe-to-Tribe trade
- Incorporate and expand General Welfare Exclusion
- Preclude application of State income and excise taxes in Indian Country
- Recognition of the "Indians Not Taxed" Constitutional foundation

- Justification:
  - Tribal governments should be able to preserve tribal wealth that is being taxed and carried away from tribal lands by the IRS
  - Tribal governments are sovereign and should not be harassed by IRS
  - Tribal governments are service providers not tax collectors
  - Indians doing business with Indians should not be interfered with by States
  - States should have no authority to tax or regulate activities within sovereign Indian lands
  - U.S. Constitutional category of "Indians Not Taxed" must be restored

- ALTERNATIVE PROPOSAL: Authorize and direct reviewof the expansion of the BIA/HIS Self-Governance Program to the Treasury Department over the next two years.

- Federal Budget Scoring Considerations:
  - None.

## V. CONCLUSION.

We are hopeful that these comments will serve as the foundation for meaningful improvements in the relationship between the United States, the Lummi Nation, and all of Indian Country. We look forward to working with you in the coming days to make these changes a reality.

If you have questions or comments, please do not hesitate to contact us or our counsel, Robert Odawi Porter, Esq. ([redacted]

Sincerely,

/s/
Timothy Ballew II, Chairman
Lummi Nation

/s/
Henry Cagey, Council Member
Lummi Nation and Chair,
Affiliated Tribes of Northwest Indians
Tax Committee